UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

NORTHERN DIVISION

BANGOR AND AROOSTOOK RAILROAD COMPANY AND BANGOR INVESTMENT COMPANY, *Plaintiffs,* v. BANGOR PUNTA OPERATIONS, INC., AND BANGOR PUNTA CORPORATION, *Defendants.*	Civil Action No. 1933

AMENDED COMPLAINT

The Plaintiffs, The Bangor and Aroostook Railroad Company and Bangor Investment Company respectfully allege as follows:

1. This civil action arises between citizens of different states, the amount in controversy, in each count, exclusive of costs and interest, exceeding Ten Thousand Dollars ($10,000.00). In addition, Counts IV and XII herein arise under Section 10 of the Clayton Act (Title 15, U.S.C. Section 20). Counts VI, VIII, X and XIII arise under Section 10(b) and 27 of the Securities Exchange Act of 1934, as amended (Title 15, U.S.C. Sections 78j(b) and 78aa) and Rule 10b-5 (CFR Sec. 240.10b-5) as promulgated thereunder by the Securities and Exchange Commission. Accordingly, this Court has jurisdiction under Title 28 U.S.C. Section 1332(a)(1) and Section 1337 and Title 15 U.S.C. Section 77(v).

2. Plaintiff, the Bangor and Aroostook Railroad Company (hereafter, BAR) is a Maine corporation organized in

1891 for the purpose of constructing, maintaining and operating a railroad for public use, and has its principal place of business in Bangor, Maine. It operates a railroad providing essential services for those persons and businesses located in the northern part of the State of Maine. BAR connects within the State of Maine with other railroads which serve the northeastern part of the United States and which, in turn, connect with other railroads serving the remainder of the United States. Freight shipments of BAR consist of products grown and manufactured in the State of Maine, including potatoes, pulp and paper products, which are sold and used in other parts of the United States.

3. Plaintiff, Bangor Investment Company (hereafter, BIC) is a Maine corporation incorporated in 1904, having its principal place of business at Bangor, Maine. Its total authorized capital stock is 250,000 shares, of which 250,000 shares are outstanding and all of which are owned by Plaintiff BAR and have been so owned during all the period of time covered by this complaint. As will hereafter appear in this complaint, BAR has used BIC for various purposes. As the owner of all the outstanding stock of BIC, BAR has totally dominated and controlled BIC which in many instances acts as BAR's *alter ego*.

4. The defendant, Bangor Punta Corporation (hereafter, Punta) is a Delaware corporation having its principal place of business in Greenwich, Connecticut, and is qualified to transact business within the State of Maine. Its stock has been listed upon the New York Stock Exchange since 1964. Punta previously operated under the names of Punta Alegre Sugar Corporation and Bangor Punta Alegre Sugar Corporation.

5. The defendant, Bangor Punta Operations, Inc. (hereafter, Operations) is a New York corporation having its

principal place of business in Greenwich, Connecticut, and is qualified to transact business within the State of Maine. Operations previously operated under the name of Punta Alegre Commodities Corporation.

6. Since its incorporation, Operations has been a wholly-owned subsidiary of Punta. During such period of time, businesses acquired by or in behalf of Punta have been held by and operated either as subsidiaries or divisions of Operations.

7. At a meeting held on March 1, 1960, the directors of BAR voted to undertake and complete a corporate reorganization in order to achieve diversification of BAR's business activities. Toward this end, the President of BAR introduced Nicholas M. Salgo of New York City (hereafter, Salgo) to the BAR board as a person able to effect a diversification program and willing to do so in return for options on BAR's stock. At said time and at all times thereafter relevant to this complaint, Salgo was an officer and director and substantial stockholder of Punta. He is presently Chairman of the Board of Punta.

8. On or about March 25, 1960, BAR and Salgo entered into a formal employment contract for a term of not less than ten years which provided that Salgo was "to suggest and develop an overall program for diversification of business activities of the Company (BAR), to explore specific avenues of diversification, to carry approved projects through to execution and to perform such other similar duties which may, from time to time, be required by the Board or by the President". At the same time, Salgo was granted a qualified option to purchase up to 20,000 shares of BAR's common stock as then constituted at $26.50 per share. The number of shares which Salgo could acquire upon exercise of said option depended upon

the future non-carrier earnings of BAR, on the basis of one share for each $100.00 of net income before taxes.

9. On or about April 20, 1960, upon advice of Salgo, BAR formed Bangor & Aroostook Corporation (hereafter, B&A) under the laws of the State of Maine to become the holding company of BAR and other non-carrier corporations to be acquired. In addition, B&A assumed BAR's employment contract with Salgo and the obligations of the stock option granted to him by BAR. Of BAR's thirteen directors, seven became directors of B&A. The two corporations had the same chairman of the board, the same president, the same vice president-finance and general counsel, the same treasurer and the same comptroller. On or about November 29, 1960, at least 80% of BAR's stock had been tendered for B&A stock, and the acquisition was consummated. Between November 29, 1960 and September 21, 1964, B&A increased its ownership of BAR's issued and outstanding stock to over 98%.

10. On or about October 13, 1964, upon advice of Salgo, B&A sold all of its assets to Operations in exchange for capital stock of Punta. The agreement provided that Operations was to assume and pay, perform and discharge all of the debts, obligations, contracts and liabilities of B&A, whether or not reflected or reserved against in B&A's balance sheets, books of account and records. Of BAR's fifteen directors, eight became directors of Punta upon the sale of B&A's assets to Operations. These eight included the chairman, the vice chairman and the president of BAR. Effective October 2, 1969, Operations sold all its stock interest in BAR to Amoskeag Company, a Delaware corporation.

11. Throughout the period 1960 to 1969, first B&A and then its successor, Operations, the latter acting as the agent and instrumentality of Punta, dominated and controlled

BAR and exploited it solely for their own purposes, to the injury of BAR and without regard to BAR's future obligations both to its creditors and to the public which it serves. By such domination, control and exploitation, B&A, Operations and Punta calculatedly drained the resources of BAR in violation of law for their own benefit, all as more specifically set out in the allegations below. Such domination and control resulted in fraudulent concealment of the systematic exploitation of BAR and, further, prevented any effective investigation being made of such exploitation and the commencement of any suit with respect thereto until after BAR was sold in 1969. The causes of action asserted in this Amended Complaint belong to BAR and are asserted directly by it. The injury to BAR is a continuing one surviving the aforesaid sale to Amoskeag.

12. Many of the acts complained of herein were never approved, authorized or ratified by BAR's directors and some acts may never have been known to them until after said sale to Amoskeag in October 1969. To the extent that some of BAR's directors did purport to approve, authorize or ratify such acts, a number of them acted under the domination and control of B&A, Operations, Punta and Salgo, without a full disclosure being made to them of all material facts. At no time, while B&A, Operations and Punta dominated and controlled BAR was there any ratification by BAR stockholders of any of the acts complained of herein, after a full, complete and candid disclosure of all material facts to them.

13. When Amoskeag acquired all of the common stock of BAR held by Operations, effective October 1, 1969, which amounted to 177,466 shares, Amoskeag took over the effective management of BAR. It acquired a railroad in serious financial condition. Net revenue from operations for the year 1970 was a loss of $1,313,603. The new manage-

ment's first task was to turn the railroad around and make it a going, viable common carrier, capable of serving the public which it is required to do.

At the same time, the Interstate Commerce Commission was conducting an analysis of the relationship between BAR, B&A, Punta and Operations as a follow-up to the Bureau of Accounts Special Review of Railroad Conglomerates dated March 11, 1969. Under date of February 1971, the Bureau of Accounts of the Interstate Commerce Commission filed an extensive report with the Interstate Commerce Commission entitled "Review of Diversified Holding Company Relationships and Transactions of Bangor Punta Corporation", which did not become public and, therefore, was not available to the new management of BAR until July 1971. The Bureau of Accounts and Controls recommended that all legal remedies be explored to require the holding company (Operations) which sold the carrier (BAR) to pay back to the carrier the (i) assets taken with no compensation and (ii) charges made where no services were performed. Management of the BAR have reviewed extensively the report of the Bureau of Accounts and Controls and the Inter-corporate relationships in detail. All wrongs hereinafter complained of were discovered by BAR's new management's investigation of all facets of the inter-corporate relationships and were not previously known to the new BAR management.

14. BAR has presently outstanding 179,810 shares of common stock. Of this total, 177,466 shares were purchased by Amoskeag from Operations by agreement effective October 1, 1969, for approximately $5 million. Since the formation of B&A and the exchange of stock between the BAR and B&A, there have been and are minority stockholder interests which are still outstanding, and many of said minority stockholder interests have been outstanding during the entire period of time covered by this complaint. The

present minority stockholders of BAR and their names, shares, and dates of respective acquisitions are shown on Schedule A annexed hereto.

15. During all the period of time covered by this Amended Complaint, BAR has had susbtantial creditors holding BAR obligations, of which the following are indicative, but not necessarily exclusive (principal amounts outstanding as of December 31, 1970):

(1) $6,322,000.00 4¼% First Mortgage Series A Bonds, due February 1, 1976.

(2) $175,000.00 5¼% First Mortgage Series B Bonds, due June 2, 1973.

(3) $2,716,000.00 5½% Income Promissory Notes, due October 1, 1995.

(4) $14,455,459.00 of equipment obligations.

16. By reason of Punta's and Operations' domination and control of plaintiff BAR and, through its control of plaintiff BAR, its effective domination and control of plaintiff BIC, Punta and/or Operations stood in a fiduciary capacity as a Trustee for BAR and BIC and for the creditors of both of said plaintiffs and for both the majority and minority stockholders of the BAR and the stockholders of BIC. Standing in this relationship, Punta and Operations, acting through its officers, agents and servants, had the duty when it had dealings with BAR and its wholly-owned subsidiary, BIC, to treat BAR and BIC fairly and to act with regard to the acquisition of the assets of either BAR or BIC only after full disclosure of all material facts then known in each transaction and to use the utmost good faith, and to make a full and adequate accounting and justification of all purchases and inter-corporate charges where Punta and Operations were in a position of majority stockholder to BAR and thus to its wholly-owned subsidiary, BIC, all of which Punta and Operations failed to do.

COUNT I

Corporate Charges—Common Law

17. During the years 1962 through 1967 B&A and, later, Operations, caused BAR to transfer the following amounts of its cash to B&A and Operations:

Year	Amount
1962	$ 70,000
1963	96,000
1964	155,000
1965	165,000
1966	204,000
1967	120,000
	$810,000 TOTAL

Cash so transferred was stated by Operations and by officers of BAR who were acting to the detriment of BAR to be in payment for legal, accounting and printing services furnished BAR by B&A and Operations and for salaries, wages and travel expenses. In fact, BAR did not, at any time, receive anything other than nominal services from B&A and Operations, which were in no way commensurate with the substantial amounts charged to it. During the same period, BAR provided legal and other services for B&A and Operations for which BAR was not compensated.

18. Though requested to do so by agents of the new management of BAR, representatives of Punta and Operations have never justified the inter-corporate charges set forth in paragraph 17. In addition, the by-laws of the corporation (Article II) required that all contracts in excess of $5,000 be reported to the board of directors. In the case of the aforesaid corporate charges, this was never done. An analysis of the records of the BAR do not show any

justification for the inter-corporate charges. The officers of the BAR who authorized the payment of the inter-corporate charges for the amounts set forth in paragraph 19 to B&A and Operations were also officers and Directors of both B&A and Operations and they authorized the payment of same knowing full well there was no justification for said payments, that there were only nominal benefits to BAR for the alleged services from B&A and Operations, and the payment of these inter-corporate charges was concealed and the true nature of same was never revealed to the Board of Directors of BAR so that they could have taken such action as would have been in the interests of BAR.

19. Payment of these corporate charges caused by B&A and Operations constituted a conversion and misappropriation of the cash assets of BAR to the sole use and benefit of B&A and Operations.

COUNT II

Corporate Charges—Maine Public Utilities Law

20. Plaintiff BAR re-alleges the allegations of paragraphs 17-19 (Count I).

21. BAR is a "public utility" as defined in the Maine Public Utilities Act, 35 Maine Revised Statutes Section 15. At the time of these transactions, B&A and Operations owned more than 25% of the common stock of BAR, to wit, at least 80% thereof.

22. All corporate charges paid by BAR as set forth in Count I were paid without prior written approval of the Maine Public Utilities Commission, as required by 35 Maine Revised Statutes Section 104, which provides, *inter alia*:

> No public utility doing business in this State shall . . . make any contract or arrangement, providing for the

> furnishing of . . . services . . . with any corporation . . . owning in excess of 25% of the voting capital stock of such public utility . . . unless and until such contract or arrangement shall have been found by the commission not to be adverse to the public interest and shall have received their (sic) written approval. . . .

Failure to obtain such approval rendered the transactions void, so that all payments of corporate charges by BAR to B&A and Operations are void under applicable Maine Law.

COUNT III

St. Croix Paper Stock—Common Law

23. Prior to acquisition of BAR by B&A, BAR's wholly-owned subsidiary, Bangor Investment Company (hereafter, BIC) had acquired shares of the common stock of St. Croix Paper Co. at a cost of $2,127,000. Of this amount, BIC was indebted in January 1960 to BAR for $1,927,000 and to a Boston bank for $200,000.

24. As set forth in paragraph 23, BIC was indebted to the BAR for $1,927,000 in January 1960 for the purchase of the St. Croix stock. BAR was likewise indebted for all the money that BIC owed BAR as BAR had borrowed same and made it available to BIC, its wholly-owned subsidiary for the purpose of acquiring the St. Croix paper stock. During 1958, when BAR was short of cash, BAR issued $500,000 in bonds, being the 5¼% First Mortgage Bonds Series B, due June 2, 1973, pursuant to approval by Interstate Commerce Commission based upon representations that the proceeds would be used for railroad purposes. Of the $500,000 received from the sale of these bonds, $400,000 was advanced by BAR to BIC, for the express purpose of purchasing more St. Croix stock. Thus, with respect to

all matters alleged in paragraph 23 and this paragraph, BIC acted as the *alter ego* of BAR and at its discretion and under its control.

25. Commencing September 1962, B&A embarked upon a scheme to obtain for itself the proceeds and benefits from the ownership and disposition of a substantial portion of the 67,789 shares of St. Croix Paper stock owned by BIC. First, B&A caused the directors of BAR to sell BIC's St. Croix stock to B&A in consideration of the following:

(a) B&A assumed the $200,000 obligation to the Boston bank.

(b) B&A issued 10,180 shares of its own stated $100 par 5% cumulative non-voting preferred to BAR and 4,820 shares of the same preferred to BIC.

(c) B&A issued its note to BAR in the principal amount of $427,000 with interest at 4½%.

B&A agreed with BAR that if the St. Croix Paper stock were sold by B&A at a profit within six months of the date B&A acquired it, B&A would give its note to BAR for the amount of the gain.

26. In January 1963, within 4 months of the date of B&A's acquisition thereof, the St. Croix Paper stock, as a result of a tender offer, was exchanged for 54,231 shares of the stock of Georgia Pacific Corporation (hereafter GP). Plaintiff BAR believes and therefore avers that at the time of the transfer of said 67,789 shares of St. Croix Paper stock by BIC to B&A, negotiations between GP and said St. Croix Paper Co. with respect to the aforesaid tender offer were taking place and were known to B&A but not

known or disclosed to BAR or BIC directors when they authorized the exchange. The "paper" profit to B&A as a result of these exchanges was approximately $585,700. B&A then issued its promissory note to BIC in said amount.

27. During 1964, after transfer by BIC to BAR of BIC's 4,820 shares of the aforesaid $100 par value preferred of B&A, B&A repurchased all of its outstanding $100 said par value preferred stock from BAR by transferring 27,735 shares of GP stock at a value of $1,554,114, which was an excess of $54,114 over the stated par value of the repurchased preferred. To compensate B&A for this difference, BAR paid B&A $54,114 in cash. BAR also paid B&A an additional $14,800 cash for 276 additional shares of Georgia Pacific stock transferred to BAR. After such transfer, B&A still owned 33,925 shares of Georgia Pacific stock which it subsequently sold for $1,995,062. No part of the proceeds of such sale was ever paid to BAR.

28. During the period B&A and its successor, Operations, held GP stock it received cash and stock dividends paid or distributed in respect of GP stock and, in addition, Operations or Punta received 2,203.1425 shares of GP stock as its proportional part of the settlement in *Taylor* v. *Georgia Pacific Corp.* 67 Civ. 11 USDC SD of N.Y., all which would otherwise have been paid to BIC for BAR's benefit.

29. The foregoing wrongful manipulations of the assets of BAR and BIC, and the conversion and misappropriation thereof by B&A, were done for the sole benefit of B&A to provide it with cash and other assets which would have otherwise been available to BAR. No benefit was derived by BAR or BIC from such manipulations, conversion and misappropriation nor were these acts of B&A motivated or done in the interest of BAR or BIC.

COUNT IV

St. Croix Paper Stock—Clayton Act

30. Plaintiffs BAR and BIC re-allege the allegations of paragraphs 23-29 above, inclusive (Count III).

31. In September 1962, when the shares of St. Croix Paper stock were transferred from BAR's wholly-owned subsidiary BIC to B&A, and B&A's aforesaid stated $100 par value preferred shares were transferred by B&A to BAR and BIC, nine of BAR's fourteen directors were also directors of B&A and at least a majority of BIC's directors were directors of B&A.

32. Title 15 United States Code Section 20 (Clayton Act, Section 10) provides, inter alia, as follows:

> "(N)o common carrier engaged in commerce shall have any dealings in securities, supplies or other articles of commerce . . . to the amount of more than $50,000, in the aggregate, in any one year, with another corporation . . . when the said common carrier shall have upon its board of directors or as its president . . . any person who is at the same time a director (or) manager . . . of . . . such other corporation unless . . . such dealings shall be with the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding."

33. The transfer of St. Croix Paper stock to B&A and B&A's transfer of its stated $100 par value preferred stock without compliance with 15 USC Section 20 constituted a violation of said Statute as to which plaintiffs BAR and BIC are entitled by law to obtain treble damages and reasonable counsel fees for the prosecution of this Count pursuant to the provisions of 15 USC Section 15.

COUNT V

St. Croix Paper Stock—Maine Public Utilities Law

34. Plaintiff BAR re-alleges the allegations of paragraphs 23-29 above, inclusive (Count III).

35. At the time of these transactions, B&A owned more than 25% of the common stock of BAR, to wit, at least 80% thereof.

36. BAR is a "public utility" as defined in the Maine Public Utilities Act 35, MRSA Section 15.

37. BAR's taking of B&A's note in the amount of $427,000 in paragraph 27 above and payment of $68,914 in cash by BAR to B&A as set forth in paragraph 27 above, were done without the prior written approval of the Maine Public Utilities Commission and constitute a violation of 35 MRSA Section 104. Failure to obtain such prior approval rendered the aforesaid note and payments void, and hence the entire transaction as set out in paragraphs 23-29 is void.

COUNT VI

St. Croix Paper Stock—Securities Exchange Act Violation

38. Plaintiff BAR re-alleges the allegations of paragraphs 23-29 above, inclusive.

39. The transaction involving the transfer of St. Croix Paper stock by BAR's wholly-owned subsidiary BIC to B&A involved the use of "manipulative or deceptive device or contrivance" in connection with the purchase or sale of a security in violation of Section 10b of the Securities Exchange Act, Title 15, USC Section 78(j)(b) and Rule 10b-5 thereunder in that (i) B&A did not disclose to either BAR or BIC that negotiations were taking place between

GP and St. Croix Paper Company for an exchange of stock, (ii) B&A did not disclose to either BAR or BIC that negotiations were taking place between GP and St. Croix Paper Company for an exchange of stock and that the management of B&A had a pre-conceived plan for disposing of the St. Croix Paper stock that it proposed to keep after ostensibly paying what appeared to be fair compensation to BIC for the St. Croix Paper stock, and (iii) the value of the said stated $100 par value preferred stock of B&A issued to BIC and BAR in consideration of the St. Croix Paper stock had a value which, even when added to the other consideration received by BIC and BAR, was substantially less than the St. Croix stock transferred by BIC and BAR.

40. The use of such manipulative or deceptive device or contrivance entitles plaintiff BAR or BIC to rescission or, in the alternative, to monetary damages in an equivalent amount.

COUNT VII

Payment of Special Dividends—Common Law

41. Operations formulated a policy whereby plaintiff BAR would declare special dividends in order to provide working capital for Operations. First, on or about October 13, 1964, the effective date of the merger of B&A and Operations, B&A and Operations caused BAR to declare and pay a special cash dividend of $2.60 per share. As owner of approximately 98% of the outstanding capital stock of BAR, B&A received said dividend in cash and, in liquidation, was able to transfer cash in the amount of $336,978.75 to Operations.

42. In July 1966, Operations continued its special dividend policy in order to reduce the substantial indebtedness owed by Operations to BAR. This consisted primarily

of obligations assumed by Operations upon its merger with B&A, including promissory notes to BAR aggregating $602,000 and a promissory note to BIC, the wholly-owned subsidiary of BAR, in the amount of $585,700. To reduce or discharge these notes, Operations caused BAR to pay special dividends in July 1966 and January 1967 each in the amount of $2.50 per share. Thus, in July 1966, the special dividend declared by BAR reduced Operations debt to it from $602,000 to $158,772.50, the dividend being $443,227.50. Again, on or about January 27, 1967, Operations first caused BIC to declare a dividend of $585,700 to BAR, consisting, in its entirety, of the promissory note of Operations in that amount held by BIC, and then simultaneously BAR declared a special dividend of $2.50 of which $443,340 was applied against the aforesaid note of Operations, leaving a balance due of $142,360. By payment of these two special dividends, Operations reduced its indebtedness to BAR from $1,187,700 to $301,132.50.

43. The declaration and payment of these special dividends by the board of directors of BAR was caused by B&A and Operations misleading and deceiving the BAR directors for the sole and exclusive benefit of Operations. Prudent and informed directors exercising independent judgment with all facts disclosed would never have declared these dividends. The policy served to deprive plaintiff BAR of a source of cash which could and would have been utilized for necessary maintenance and equipment acquisitions and replacements, all to the injury of BAR and the public which it serves.

COUNT VIII

Payment of Special Dividend—Securities Law

44. Plaintiff BAR re-alleges the allegations of paragraphs 41-43.

45. Said cancellation of notes and other matters relating to the payment of special dividends constituted a purchase of securities by BAR, and was accomplished by B&A and Operations using manipulative or deceptive devices or contrivances in connection therewith in violation of Section 10b of the Securities Exchange Act, Title 15, USC Section 78(j) (b), and Rule 10b-5 thereunder.

COUNT IX

Borrowing to Pay BAR Dividend—Common Law

46. The BAR balance sheet as of August 31, 1967, did not meet the requirements governing payment of regular dividends as set forth in the certain Supplemental Bond Indenture of February 1, 1956 between BAR and the Old Colony Trust Company of Boston, Massachusetts, Trustee, relating to 4¼% First Mortgage Bonds of BAR. Specifically, Article 7, Section 11 of said Indenture provided that BAR would not declare or pay any dividends if "after giving effect thereto, Net Working Capital is less than the sum of (y), Fixed Charges for the next ensuing twelve months' period and (z) the then annual sinking fund requirements (on a non-cumulative basis) on all outstanding bonds". As of August 30, 1967, BAR's fixed charges for the next twelve-month period were approximately $1,300,000 and the sinking fund requirement was $125,000 so that in order to declare dividends, working capital would have to exceed $1,425,000 and the dividends so declared could only be in the amount of such excess. The aforesaid balance sheet as of August 31, 1967, showed working capital of only $1,070,000, and the balance sheet of September 30, 1967, showed working capital reduced to $795,000.

47. In order to "meet" the dividend requirement of said Indenture on October 30, 1967, BAR's wholly-owned

subsidiary, BIC, on or about October 26, 1967, borrowed, on demand, $1,200,000 from a bank. Immediately thereafter, BIC loaned said amount to BAR for a term of fifteen months. Neither the borrowing by BIC nor the lending of borrowed funds by BIC to BAR were approved by either the directors of BAR or BIC. The loan to BAR of $1,200,000, ostensibly being for a term in excess of one year, was recorded on BAR's books as a long-term debt and BAR's net working capital was thereby "increased" by $1,200,000 on its balance sheet as of October 31, 1967. In fact, BAR repaid the loan of $1,200,000, with interest amounting to $3,667, on November 15, 1967. After the loan had been repaid and BAR's "working capital" reduced as a result thereof, Operations caused BAR's Executive Committee, on or about December 1, 1967, to declare a regular dividend to be paid on December 29, 1967, in the amount of 20¢ per share, based on the balance sheet of October 31, 1967. The total amount of such dividend was $35,962, of which Operations received approximately $35,500.

48. The aforesaid loan of $1,200,000 was obtained solely for the express purpose of wrongfully appearing to satisfy the dividend restriction contained in the Supplemental Bond Indenture. Payment of said dividend was improper under the Indenture in violation of the duties of the BAR directors to BAR. The scheme constituted a conversion and misappropriation of the assets of BAR.

COUNT X

Borrowing to Pay BAR Dividend—Securities Law

49. Plaintiff BAR re-alleges the allegations of paragraphs 46-48.

50. Said borrowing and payment of dividend constituted a manipulative or deceptive device or contrivance in

violation of Section 10(b) of the Securities Exchange Act, Title 15 USC Section 78(j)(b), and Rule 10b-5 thereunder, and constituted a continuance of the underlying scheme to wrongfully deprive BAR of its cash and assets.

COUNT XI

B&A Loan—Common Law

51. In July 1960, B&A caused BAR to loan B&A an aggregate amount of $75,000, evidenced by two notes, each bearing interest at 5%. On or about November 30, 1960, B&A caused BAR's board of directors to excuse payment of all interest on the loan. Operations assumed the obligations on the loan when B&A was merged into it in 1964. When BAR declared a special dividend on June 15, 1966, the amount of the dividend was applied in reduction of the amount owed by Operations to BAR. No interest was ever paid by B&A or Operations on the two notes.

52. The non-payment of interest with respect to the aforesaid loan was unfair to BAR, did not result from arms-length bargaining and constituted wrongful exploitation by B&A and Operations of BAR for the sole and exclusive benefit of B&A and BAR.

COUNT XII

B&A Loan—Clayton Act

53. Plaintiff BAR re-alleges the allegations of paragraphs 51-52 herein.

54. At the time of making of the aforesaid loan, BAR and B&A had seven common directors and the same president.

55. The aforesaid loan as evidenced by the two aforesaid notes constituted a violation of Section 10 of the Clayton Act (Title 15 USC Section 20) and Plaintiff is entitled to obtain treble damages and reasonable counsel fees for

the prosecution of this Count pursuant to the provisions of 15 USC Section 15.

COUNT XIII

B&A Loan—Securities Law

56. Plaintiff BAR re-alleges the allegations of paragraphs 51-52.

57. Said transaction constituted a manipulative or deceptive device or contrivance in violation of Section 10(b) of the Securities Exchange Act, Title 15 USC Section 78(j)(b), and Rule 10b-5 thereunder, in that B&A had no intention of ever repaying the loan or any interest thereon and that this was a part of the underlying scheme to wrongfully deprive BAR of its cash and assets.

WHEREFORE, Plaintiff BAR requests that it have judgment jointly and severally against the Defendants as follows:

(1) Under Count I for $810,000.

(2) Under Count II for $810,000.

(3) Under Count III for $1,995,062 plus $54,114, plus $14,800, plus the amounts realized by the defendants on the sale of the 2,203.1425 shares of G.P. stock received in the *Taylor* settlement, less the amount of the obligations B&A assumed in connection with the St. Croix transactions, being $200,000 plus $585,700, leaving approximately $1,500,000 which BAR seeks as judgment on this Count.

(4) Under Count IV for triple the damage under Count III, totaling approximately $4,500,000 plus reasonable attorney's fees.

(5) Under Count V for approximately $1,500,000.

(6) Under Count VI for approximately $1,500,000.

(7) Under Count VII for $1,223,546.25.

(8) Under Count VIII for $1,223,546.25.

(9) Under Count IX for $39,629.

(10) Under Count X for $39,629.

(11) Under Count XI for fair and reasonable interest on the $75,000 in loans from the date of making.

(12) Under Count XII for triple the damages in Count XI, plus reasonable attorneys' fees.

(13) Under Count XIII for fair and reasonable interest on the $75,000 in loans from the date of making.

(14) And, in addition, wherever proper, for interest, fair and reasonable attorneys' fees, costs and such other relief as appears just and equitable.

Dated at Portland, Maine, this 18th day of August, 1972.

BANGOR AND AROOSTOOK RAILROAD COMPANY

AND

BANGOR INVESTMENT COMPANY

/s/ ROGER A. PUTNAM
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Schedule A

to Amended Complaint

Stockholder	Number of Shares	Date of Acquisition
Harry N. Ball	50	5/29/56
Bangor Punta Operations, Inc.	26	8/ 8/71
Adele Bevilacqua	32	2/20/65
Dorothy H. Corbett	300	12/ 4/45
	15	4/ 1/55
Thomas C. Corbett	300	3/ 5/56
Mrs. Ruth M. Fox	1	4/ 1/55
Wilbar M. Hoxie	2	8/ 9/49
Murray Kaplan	100	12/10/59
Carl Lehr	5	12/ 1/60
Theodore N. Levin	5	7/ 7/66
Carl M. Sangree, Jr.	9	3/ 5/56
Donald B. Smith, Jr.	2	6/21/61
Mrs. Ruth M. Sprague	5	4/ 1/55
Stuart R. Stevenson	3	1/17/63
Archibald Roy Thomson, Jr.	1	8/26/65
Tweedy, Browne & Knapp	1	2/ 3/71
Mrs. Beverly M. Wiggert	67	10/ 5/65
Mrs. Edith E. Wiggert	50	9/12/51
	30	10/31/51
	4	4/ 1/58

Stockholder	Number of Shares	Date of Acquisition
Mrs. Jeannie E. Wiggert	15	10/ 5/65
Harry H. Wiggert	50	11/15/51
	50	4/ 7/54
	5	4/ 1/55
	26	8/26/64
John Clayton Wiggert	20	9/12/51
	30	12/ 3/51
	50	11/15/51
	5	4/ 1/55
	26	8/26/64
Mrs. Mabel A. Wiebke	10	2/15/34

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

BANGOR AND AROOSTOOK RAILROAD COMPANY AND BANGOR INVESTMENT COMPANY, *Plaintiffs,* —*against*— BANGOR PUNTA OPERATIONS, INC. AND BANGOR PUNTA CORPORATION, *Defendants.*	Civil Action No. 1933

ANSWER

The defendants Bangor Punta Corporation ("Bangor Punta") and Bangor Punta Operations, Inc. ("BPO") for their answers to the amended complaint, allege as follows:

FIRST: Deny each and every allegation contained in Paragraph 1.

SECOND: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2, except admit that BAR is a Maine corporation organized in 1891 with its principal place of business in Bangor, Maine, and is engaged principally in the railroad business.

THIRD: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 3, except admit that between 1960 and October 2, 1969, BAR owned all of the outstanding capital stock of BIC and BIC is a Maine corporation.

FOURTH: Admit the allegations of Paragraph 9, except deny knowledge or information sufficient to form a belief as to the truth of the allegation that the BAR was formed upon the advice of Salgo.

FIFTH: Admit the allegations of Paragraph 10, except deny the allegations relating to the terms and conditions of the Agreement between BAC and Bangor Punta and the Court is respectfully referred to the Agreement between BAC and Bangor Punta for the terms and conditions thereof, and deny knowledge and information sufficient to form a belief as to the truth of the allegation that BAC sold its assets upon the advice of Salgo.

SIXTH: Deny each and every allegation contained in paragraphs 11 and 12.

SEVENTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 13, except admit that effective as of October 1, 1969 Amoskeag acquired 177,466 shares (or 98.3%) of the Common Stock of BAR from BPO and Bangor Punta, Amoskeag took over the effective management of BAR as of October 1, 1969 and there is a report entitled "Review of Diversified Holding Company Relationships and Transactions of Bangor Punta Corporation".

EIGHTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 14, except admit that Amoskeag purchased 177,466 shares of Common Stock of BAR from BPO and Bangor Punta by an agreement effective as of October 1, 1969 for approximately $5 million, there were minority stockholders (1.7%) of the BAR prior to October 1, 1969 and BPO is the owner of 26 BAR shares as reflected in Schedule A.

NINTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 15, except admit that BAR had creditors during the period of time covered by the amended complaint.

TENTH: Deny each and every allegation contained in Paragraph 16.

ELEVENTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 17.

TWELFTH: Deny each and every allegation contained in Paragraphs 18 and 19.

THIRTEENTH: Repeat and reiterate their answers as set forth in Paragraphs *Eleventh* and *Twelfth* herein to the allegations of Paragraph 20.

FOURTEENTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 22.

FIFTEENTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 23, 24, 25, 26, 27, 28, 29, 30 and 31.

SIXTEENTH: Deny each and every allegation contained in Paragraph 33.

SEVENTEENTH: Repeat and reiterate their answers as set forth in Paragraph *Fifteenth* herein to each and every allegation in Paragraph 34.

EIGHTEENTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 37.

NINETEENTH: Repeat and reiterate their answers as set forth in Paragraph *Fifteenth* herein to each and every allegation in Paragraph 38.

TWENTIETH: Deny each and every allegation contained in Paragraphs 39 and 40.

TWENTY-FIRST: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51 and 52.

TWENTY-SECOND: Repeat and reiterate their answers as set forth in Paragraph *Twenty-first* herein in respect of Paragraphs 51 and 52 to each and every allegation in Paragraphs 53 and 56.

TWENTY-THIRD: Deny each and every allegation contained in Paragraphs 55 and 57.

As and For a First Affirmative Defense

TWENTY-FOURTH: The causes of action alleged in the complaint are barred by the applicable statutes of limitations.

As and For a Second Affirmative Defense

TWENTY-FIFTH: The complaint fails to state a cause of action.

As and For a Third Affirmative Defense

TWENTY-SIXTH: The Amoskeag Company having purchased approximately 99% of the BAR shares from Bangor Punta subsequent to the acts alleged herein, plaintiffs are estopped from maintaining this action.

As and For a Fourth Affirmative Defense

TWENTY-SEVENTH: Plaintiffs had notice of all of the facts and all of the acts of the defendants set forth in the complaint and nevertheless have refrained from commencing this action until December 31, 1971 and have thereby been guilty of such laches as should in equity bar the plaintiffs from maintaining this action.

As and For a Fifth Affirmative Defense

TWENTY-EIGHTH: Plaintiffs, with full knowledge of all of the facts relating to the transactions alleged in the complaint, duly ratified and affirmed the acts of the defendants alleged in the complaint.

As and For a Sixth Affirmative Defense

TWENTY-NINTH: Plaintiffs do not have the capacity to maintain this action.

Dated: Portland, Maine
September 15, 1972

BERNSTEIN, SHUR, SAWYER & NELSON

By _____
Attorneys for Defendants

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and BANGOR PUNTA CORPORATION
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UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

NORTHERN DIVISION

BANGOR AND AROOSTOOK RAILROAD COMPANY AND BANGOR INVESTMENT COMPANY, *Plaintiffs,* v. BANGOR PUNTA OPERATIONS, INC. AND BANGOR PUNTA CORPORATION, *Defendants.*	Civil Action, Docket No. 1933

Motion For Summary Judgment

The Defendants respectfully move that summary judgment be granted in favor of the Defendants pursuant to F.R.C.P. Rule 56(b):

(1) By dismissing the entire complaint, as amended, herein, with prejudice, for the reason that the complaint fails to state a cause of action on behalf of the corporate Plaintiffs; or, in the alternative,

(2) By dismissing each of Count II and Count V of the amended complaint herein, with prejudice, for the reason that each of them fails to state a cause of action.

The Defendants' Memorandum of Law in support of this Motion dated September 15, 1972, is herewith submitted.

Dated at Portland, Maine, this fifteenth day of September, A.D. 1972.

BANGOR PUNTA OPERATIONS, INC.
and
BANGOR PUNTA CORPORATION

/s/ HERBERT H. SAWYER
Attorney for the Defendants
BERNSTEIN, SHUR, SAWYER & NELSON
One Monument Square
Portland, Maine 04111

December 29, 1972, District Court Opinion

BANGOR AND AROOSTOOK RAILROAD COMPANY and
BANGOR INVESTMENT COMPANY,
Plaintiffs,

v.

BANGOR PUNTA OPERATIONS, INC. and
BANGOR PUNTA CORPORATION,
Defendants.

Civ. No. 1933.

UNITED STATES DISTRICT COURT
D. MAINE, N. D.
DECEMBER 29, 1972.

OPINION AND ORDER OF THE COURT

GIGNOUX, *District Judge.*

This action arises under the Securities Exchange Act of 1934, the Clayton Antitrust Act, the Maine Public Utilities Act, and the common law of Maine. Plaintiff Bangor and Aroostook Railroad Company (BAR) is a Maine corporation which operates a railroad in the northern part of the State of Maine. Plaintiff Bangor Investment Company (BIC), a Maine corporation, is a wholly-owned subsidiary of BAR. Defendant Bangor Punta Corporation (Bangor Punta), a Delaware corporation, is a diversified holding company with operating units in various industries. Defendant Bangor Punta Operations, Inc. (BPO), a New York corporation, is a wholly-owned subsidiary of Bangor Punta. On October 13, 1964, Bangor Punta, through its wholly-owned subsidiary BPO, became the owner of approximately 98.3% of the stock of BAR when BPO acquired all the assets of Bangor and Aroostook Corporation (BAC), a Maine

holding company which BAR had caused to be formed in 1960. From October 13, 1964 until October 2, 1969, Bangor Punta owned through BPO approximately 98.3% of all the outstanding stock of BAR. On October 2, 1969, BPO sold all its stock interest in BAR to Amoskeag Company (Amoskeag), a Delaware investment company controlled by Frederic C. Dumaine, Jr., for a consideration of approximately $5,000,000. Subsequently, Amoskeag has purchased additional BAR shares, and now owns over 99% of all the outstanding capital stock of BAR.

The complaint contains thirteen counts and seeks damages totaling appproximately $7,000,000 for misappropriation and waste of corporate assets alleged to have been caused to BAR by four intercompany transactions, which allegedly took place between BAC or Bangor Punta and BAR during the period between 1960 and 1967, while BAC and then Bangor Punta were in control of BAR. Counts I and II are brought, respectively, under the common law of Maine (Count I) and Section 104 of the Maine Public Utilities Act (35 M.R.S.A. § 104) (Count II). They charge that BAC, and later BPO, improperly charged BAR for nominal legal, accounting, printing and other services furnished BAR by BAC and BPO. Counts III, IV, V and VI are brought, respectively, under the common law of Maine (Count III); Section 10 of the Clayton Antitrust Act (15 U.S.C. § 20) (Count IV); Section 104 of the Maine Public Utilities Act (Count V); and Section 10(b) of the Securities Exchange Act (15 U.S.C. § 78j(b)) and Rule 10b-5 (17 C.F.R. § 240.10b-5) promulgated thereunder by the Securities and Exchange Commission (Count VI). They are based upon the charge that BAC improperly acquired St. Croix Paper Company stock owned by BAR through its wholly-owned subsidiary BIC. Counts VII, VIII, IX and X are brought, respectively, under the common law of Maine (Counts VII and IX); and Section 10(b) of the Securities

Exchange Act and Rule 10b-5 thereunder (Counts VIII and X). They charge that BAC and BPO improperly caused BAR to declare special dividends to its stockholders, including BAC and BPO, and improperly caused BIC to borrow so as to satisfy certain balance sheet ratios required by an earlier loan agreement in order to pay a regular dividend. Counts XI, XII and XIII are brought, respectively, under the common law of Maine (Count XI); Section 10 of the Clayton Antitrust Act (Count XII); and Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder (Count XIII). They allege that BAC improperly caused BAR to excuse payment by BAC and BPO of the interest due on a loan made by BAR to BAC. In substance, the complaint alleges that Bangor Punta and its predecessor in interest, BAC, while they were in control of BAR through ownership of 98.3% of its stock, "calculatedly drained the resources of BAR in violation of law for their own benefit" during the period between 1960 and 1967, prior to the time Amoskeag purchased Bangor Punta's interest in BAR.

Presently before the Court is defendants' motion for summary judgment dismissing the entire complaint, or in the alternative dismissing the two counts brought under the Maine Public Utilities Act (Counts II and V). Defendants seek dismissal of the entire complaint on the ground that Amoskeag, which would be the sole beneficiary of any recovery by the corporate plaintiffs, was not a stockholder of BAR at the time of the alleged improper transactions and itself has sustained no injury as a result thereof. The Court agrees. Since the Court therefore concludes that the entire complaint must be dismissed, it does not reach defendants' alternative motion for dismissal of Counts II and V.

It is true that, as plaintiffs assert, the present action is an action brought by the corporate plaintiffs in their own

right, and does not purport to be a derivative action on behalf of either Amoskeag or the 1% minority stockholders in BAR. But, looking at the substance of the action, it is evident that the real party in interest is Amoskeag, the present owner of over 99% of the outstanding BAR shares. And having purchased the stock of BAR from Bangor Punta in 1969, long after the events complained of occurred, Amoskeag is clearly attempting, by having the corporations which it controls bring the action in their names, to recover the full $5,000,000 consideration paid to Bangor Punta for the BAR shares, plus $2,000,000 more, while still keeping the BAR shares. Amoskeag does not claim that it was deceived or defrauded by Bangor Punta when it purchased its BAR stock, or that it did not get full value for its purchase price. Nor do plaintiffs claim to bring this action on behalf of any creditors or in the public interest. It would accordingly be contrary to settled equitable principles to permit Amoskeag, by thus using the corporate fiction, to acquire a windfall for any past misbehavior on the part of Bangor Punta during the period when Amoskeag had no interest in BAR and sustained no injury, direct or indirect, as a result of Bangor Punta's alleged improper acts.

Plaintiffs admit that the alleged wrongs took place before Amoskeag purchased its BAR stock from Bangor Punta. Under these circumstances, there can be little doubt that Amoskeag would be barred from maintaining a derivative suit on behalf of BAR for the wrongs alleged to have occurred before Amoskeag purchased its BAR shares. As to the claims asserted under the Securities Exchange Act and the Clayton Antitrust Act, Fed.R.Civ.P.23.1 would apply and in terms requires contemporaneous ownership for maintenance of a stockholder derivative action. *Surowitz* v. *Hilton Hotels Corp.*, 342 F. 2d 596, 604 (7th Cir.

1965); *Gottesman* v. *General Motors Corp.*, 28 F.R.D. 325 (S.D.N.Y.1961). To the extent that plaintiffs' claims arise under state law, jurisdiction being based upon diversity of citizenship, there is doubt as to whether the federal rule or state law applies. *See* 3B Moore's Federal Practice (2d ed. 1969) ¶ 23.1.15[2]. The majority of states, however, also have adopted the contemporaneous ownership rule, either by judicial decision or by statute. *Id.* at note 6. And even in those cases where the rule has not been applied, it has been held that a subsequent shareholder cannot sue where, as in the present case, he acquired his stock from the alleged wrongdoer, who himself would have been barred by his participation and acquiescence.[1] *See, e. g., Bloodworth* v. *Bloodworth*, 225 Ga. 379, 387, 169 S.E.2d 150, 156-157 (1969); *Babcock* v. *Farwell*, 245 Ill. 14, 40-41, 91 N.E. 683, 692-693 (1910); *Home Fire Insurance Co.* v. *Barber*, 67 Neb. 644, 661-662, 93 N.W. 1024, 1030-1031 (1903); *Bookman* v. *R. J. Reynolds Tobacco Co.*, 138 N.J.Eq. 312, 372, 48 A.2d 646, 680 (Ch.1946). Plaintiffs instituted the present suit two days prior to the effective date of the new Maine Business Corporation Act, which adopts the contemporaneous ownership rule, 13-A M.R.S.A. § 627(1)(A) (1972). It is an open question in Maine whether the contemporaneous ownership rule applied at the time the present suit was brought. *See* Field, McKusick & Wroth, Maine

1. Plaintiffs allege no facts which would support the allegation in their complaint that "[t]he injury to BAR is a continuing one surviving the aforesaid sale [from BPO] to Amoskeag." There is thus no basis for any suggestion that they may rely upon the "continuing wrong" exception to the contemporaneous ownership rule, which permits a subsequent stockholder to maintain a derivative suit if the alleged wrongful acts and their effects continue and are injurious to to him. Moreover, there is serious question as to whether such an exception should be recognized at all. *Compare* Duncan v. National Tea Co., 14 Ill.App.2d 280, 144 N.E.2d 771, 775 (1957) *with* Weinhaus v. Gale, 237 F.2d 197, 199-200 (7th Cir. 1956); Bowman v. Alaska Airlines, 14 Alaska 62, 14 F.R.D. 70, 72 (1952).

Civil Practice (2d ed. 1970) § 23.2 at 393.[2] But there is no indication in the Maine cases that the Maine court would not have followed the prevailing rule. In such situations, where the law of the particular state is not shown to be in conflict with the federal rule, federal courts will apply Rule 23.1. *Gallup* v. *Caldwell,* 120 F.2d 90, 94-95 (3rd Cir. 1941); *Mullins* v. *DeSoto Securities Co.,* 45 F.Supp. 871, 878 (W.D.La.1942); *see 3B* Moore's Federal Practice, ¶ 23.1.-15[2] at n. 13. Thus, whether the federal rule or Maine law is applicable, Amoskeag could not maintain a derivative action against the defendants.

From the foregoing, it is evident that Amoskeag, by causing the plaintiff corporations to bring this action, is attempting to accomplish indirectly what it could not do directly. Plaintiffs contend that the Court cannot look beyond the corporate form to the substance of the corporate claims and the true beneficiary thereof. But the four intercompany transactions that are the basis of plaintiffs' claims are typical stockholder claims seeking an accounting for alleged misappropriation and waste of corporate assets by controlling stockholders. Equitable considerations must be applied in such actions. *Amen* v. *Black,* 234 F.2d 12 (10th Cir. 1956); *Matthews* v. *Headley Chocolate Co.,* 130 Md. 523,

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2. Defendants point to Hyams v. Old Dominion Co., 113 Me. 294, 93 A. 747 (1915) as indicating the new Maine Business Corporation Act merely codified pre-existing Maine law. In that case, the defendant objected that the plaintiff could not complain because the wrong, if any, was done before he became a stockholder. The court said: "One answer to this, and a sufficient one, is that the wrong is a continuing one." 113 Me. at 302, 93 A. at 750. *See also* Jeffs v. Utah Power and Light Co., 136 Me. 454, 465 12 A.2d 592 (1940). Although it can be argued that by applying the continuing wrong exception to the contemporaneous ownership rule, *see* note 1, *supra,* the Maine court impliedly acknowledged that Maine law required contemporaneous ownership in shareholder actions, the court's cryptic statement is indeed "too enigmatic to be very helpful." Field, McKusick and Wroth, Maine Civil Practice, *supra.*

100 A. 645 (1917); *Home Fire Insurance Co.* v. *Barber, supra.* Nor does characterizing the actions as claims arising under federal statutes save them from the scrutiny of equity. *Columbia Nitrogen Corp.* v. *Royster Co.* 451 F.2d 3, 15-16 (4th Cir. 1971) (antitrust laws); *Royal Air Properties, Inc.* v. *Smith,* 312 F.2d 210, 213-214 (9th Cir. 1962) (securities laws). *See also Edwin L. Wiegand Co.* v. *Harold E. Trent Co.,* 122 F.2d 920, 925 (3rd Cir. 1941) (copyright laws). The equitable principle that the corporate form "will not be allowed to be pushed to the extent of furthering injustice rather than justice" is well established, and has been applied to cases where the plaintiff attempted to use the corporate form to achieve results which he could not accomplish in his own right. *Western Battery & Supply Co.* v. *Hazelett Storage Battery Co.,* 61 F.2d 220, 230 (8th Cir. 1932), cert. denied, 288 U.S. 608, 53 S.Ct. 399, 77 L. Ed. 982 (1933); *Shamrock Oil and Gas Co.* v. *Ethridge,* 159 F.Supp. 693 (D. Colo. 1958). Since Amoskeag, which did not itself incur any damage as a result of defendants' alleged wrongful acts, and not the corporate plaintiffs, is the real beneficiary of any recovery which might be had in the name of the corporate plaintiffs, the corporate claims must fail for lack of equity on the part of those who would ultimately benefit from any corporate recovery.

The applicable principle was stated long ago by Dean Roscoe Pound, then a Commissioner of the Supreme Court of Nebraska, in the leading case of *Home Fire Insurance Co.* v. *Barber, supra:*

> Where a corporation is not asserting or endeavoring to protect a title to property, it can only maintain a suit in equity as the representative of its stockholders. If they have no standing in equity to entitle them to the relief sought for their benefit, they cannot obtain such relief through the corporation or in its own name. (citations omitted). It would be a reproach to courts

> of equity if this were not so. If a court of equity could not look behind the corporation to the shareholders, who are the real and substantial beneficiaries, and ascertain whether these ultimate beneficiaries of the relief it is asked to grant have any standing to demand it, the maxim that equity looks to the substance, and not the form, would be very much limited in its application. 67 Neb. at 664-665, 93 N.W. at 1031-1032.

In *Home Fire,* the court sustained a corporate claim, which it considered to be brought at law, to recover company monies wrongfully withdrawn by Barber and converted to his own use. But the court denied recovery by the corporation upon claims, which it considered to be brought in equity, for corporate mismanagement and waste allegedly committed by Barber, where the existing stockholders, who would be the real beneficiaries of a recovery, had acquired their stock subsequent to the acts complained of, and were hence found to have no standing in equity.

The case of *Amen* v. *Black, supra,* presented facts similar to the instant case. In *Amen,* a corporation, through its receivers, asserted claims for recovery of the profits allegedly realized by Black, its former president and chairman of the Board, from the improper use of company funds and from the sale of corporate stock which Black had wrongfully obtained from the corporation and later sold to N.C.R.A. The court denied relief to the corporation, holding:

> Looking at the substance of the corporate claims and the beneficiaries thereof, it becomes readily apparent that the principal beneficiary of any recovery on behalf of the corporation would be the N.C.R.A. who became the principal stockholder upon the purchase of a majority of the stock in 1947. And having

purchased the stock of the corporation from Black in an arms length transaction, and having received the full value of its purchase, any recovery as stockholder beneficiary of the dissolved corporation would be tantamount to recoupment of the legitimate purchase price of the stock. Obviously there are no equities in such a result, and we therefore hold that the corporate claims must fail for lack of standing to maintain the suit and for want of equity on the part of the beneficiaries in any corporate recovery. 234 F.2d at 23.

Similarly, in *Matthews* v. *Headley Chocolate Co., supra* Headley Chocolate Company commenced an action against Matthews and six other former directors and controlling shareholders to recover damages for the alleged wrongful misappropriation of corporate assets. Subsequent to the alleged wrongs, Matthews had sold a controlling interest in the corporation to one Rodda and his associates. After concluding that Rodda would be barred from maintaining a derivative action, the court stated:

The question then is whether this bill can be sustained in the name of the corporation, and, if so, how the defendants can be protected from claims we have spoken of as not entitled to relief. Inasmuch as by the change of the majority of stock those who were minority stockholders at the time of the transactions complained of are now able to have the suit brought in the name of the company, we are of the opinion that it can be maintained, in that name, instead of in the names of the minority stockholders but for their benefit. But while that is so, if there be any recovery by reason of the claims spoken of, it can only be to the extent of the proportions of the sum recovered due such minority stockholders, if any, as are not barred by

laches, limitations, acquiescence, or other way sufficient to bar them in equity, and anything recovered should be directed to be paid to them by the corporation. Any defense that could have been made against the minority stockholders if they had sued in their own names should be allowed, notwithstanding the fact that the suit is in the name of the corporation. It seems to us that that course is the only one which in equity and justice can be adopted in this case. The purchasers from Matthews have lost nothing, so far as the bill discloses, and if he deceived them in the sale, they have their remedy against him individually, but they should not be permitted to use the corporate name to veil defects in the title to the stock transferred to them by the former stockholder who received about two-thirds of the amounts claimed to have been improperly paid. 130 Md. at 536-537, 100A. at 651.

Thus, the court in *Headley Chocolate,* while holding that the corporation had standing to sue, held it could recover only for those minority stockholders who held their shares at the time of the alleged wrongs and who were not barred by any equitable defenses In the present case, plaintiffs have expressly disclaimed that they are seeking a proportionate recovery on behalf of the 1% minority stockholders in BAR.

The principle that a suit cannot be brought by a corporation where the ultimate beneficiaries of a corporate recovery would be barred was also applied in *Capitol Wine and Spirit Corp.* v. *Pokrass,* 277 App. Div. 184, 98 N.Y.S.2d 291 (1st Dep't. 1950), aff'd, 302 N.Y. 734, 98 N.E.2d 704 (1951).

Research has disclosed no case the holding of which is contrary to that of the foregoing authorities. In *Central*

Railway Signal Co. v. *Longden*, 194 F.2d 310 (7th Cir. 1952), cited by plaintiffs, the court found that there had been no change of ownership of the plaintiff corporation subsequent to the time of the acts complained of. *Id.* at 321. The court's comments on the present question were dictum unnecessary to the decision of the case, and in any event the court seems to be saying no more than that Fed. R.Civ.P. 23 (b) (the predecessor of Rule 23.1) does not apply to a suit by a corporation. *Idem.* Furthermore, it does not appear that Longden, the alleged wrongdoer, was a controlling stockholder, or that the owner of 99% of plaintiffs' stock at the time of suit had acquired its shares from stockholders who had participated in Longden's wrongdoing.

Plaintiffs' final argument is that defendants are in no position to assert equity because if recovery is here denied defendants will be able to keep the fruits of their allegedly wrongful acts. The same argument was made by the plaintiff and rejected by the court in *Home Fire Insurance Co.* v. *Barber, supra.* In the words of Dean Pound:

> But it is said the defendant Barber, by reason of his delinquencies, is in no position to ask that the court look behind the corporation to the real and substantial parties in interest. . . . We do not think such a proposition can be maintained. It is not the function of courts of equity to administer punishment. When one person has wronged another in a matter within its jurisdiction, equity will spare no effort to redress the person injured, and will not suffer the wrongdoer to escape restitution to such person through any device or technicality. But this is because of its desire to right wrongs, not because of a desire to punish all wrongdoers. If a wrongdoer deserves to be punished, it does not follow that others are to be enriched at his expense by a court

of equity. A plaintiff must recover on the strength of his own case, not on the weakness of the defendant's case. It is his right, not the defendant's wrongdoing, that is the basis of recovery. When it is disclosed that he has no standing in equity, the degree of wrongdoing of the defendant will not avail him. 67 Neb. at 673, 93 N.W. at 1035.

For the reasons stated, defendants' motion for summary judgment dismissing the entire complaint is granted.

It is so ordered.

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

NORTHERN DIVISION

BANGOR AND AROOSTOOK RAILROAD COMPANY AND BANGOR INVESTMENT COMPANY, *Plaintiffs,* v. BANGOR PUNTA OPERATIONS, INC. AND BANGOR PUNTA CORPORATION, *Defendants.*	Civil Action, Docket No. 1933

Notice is hereby given that Bangor and Aroostook Railroad Company and Bangor Investment Company, Plaintiffs above named, hereby appeal to the United States Court of Appeal for the First Circuit from the order of the District Court granting Defendants' motion for summary judgment dismissing the entire complaint entered in this action on the 29th day of December 1972.

January 17, 1973

/s/ ROGER A. PUTNAM
Counsel for Plaintiffs

VERRILL DANA PHILBRICK
PUTNAM & WILLIAMSON
57 Exchange Street
Portland, Maine 04111
207-774-4573

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

NORTHERN DIVISION

BANGOR AND AROOSTOOK RAILROAD COMPANY AND BANGOR INVESTMENT COMPANY, *Plaintiffs,* *vs.* BANGOR PUNTA OPERATIONS, INC. AND BANGOR PUNTA CORPORATION, *Defendants.*	Civil Action No. 1933

Affidavit

STATE OF MAINE
COUNTY OF PENOBSCOT } ss.:

WILLIAM M. HOUSTON, being duly sworn, deposes and says:

1. I am presently Vice President and General Counsel of the Bangor and Aroostook Railroad Company (hereafter BAR). I am a member of the Maine and Massachusetts Bars and have been since 1954. I am also the Clerk of BAR. I was the Assistant Clerk of BAR from 1956 to 1966, at which time I was elected Clerk and have been employed by the BAR since 1955.

2. I have regularly attended Board meetings of the BAR since 1955 and know the Directors of BAR by sight and by name.

3. As of the date of the last Board meeting (December 8, 1971) there were 17 Directors of the BAR. Their names,

the dates they began to serve as Directors and the dates of any resignations are as follows:

(a)

	Elected	Resigned
W. Gordon Robertson	1953	2- 1-1972*
Fred L. Putnam	1940	
W. Jerome Strout	1956	
George H. Seal	1960	1- 6-1972**
William E. Hill	1962	1-12-1972**
Wendell L. Phillips	1963	
Joseph R. LaPointe	1965	
John R. McPike	1967	
Richard K. Warren	1967	
Jack Roth	1968	
Thomas E. Houghton, Jr.	1968	
Frederic C. Dumaine, Jr.	1969	
Dudley B. Dumaine	1969	
Roger B. Prescott, Jr.	1969	
Harry C. Wood	1960	1-10-1972**
Lawrence A. Thibodeau	1970	
Thomas S. Pinkham	1970	

* Serves as General Trustee of Bangor Punta Employees Profit Sharing Plan and Trust.

** Director of Bangor Punta Corporation.

4. Since the Amoskeag Company purchased some 99% of the BAR stock from Bangor Punta Corporation in October 1969, the question of possible legal proceedings against Bangor Punta Corporation had been discussed by the BAR Board twice at official meetings, once on July 29, 1971 and once on December 8 1971. I was personally present at both meetings.

5. Present at the first meeting were the following Directors:

Frederic C. Dumaine, Jr.	Wendell L. Phillips
Dudley B. Dumaine	Joseph R. LaPointe
W. Gordon Robertson	John R. McPike
Fred L. Putnam	Thomas E. Houghton, Jr.
W. Jerome Strout	Roger B. Prescott, Jr.
George H. Seal	Harry C. Wood
William E. Hill	Lawrence A. Thibodeau
	Thomas S. Pinkham

6. At this meeting the report of the Bureau of Accounts of the Interstate Commerce Commission, dated February 1971, and entitled "Review of Diversified Holding Company Relationships and Transactions of Bangor Punta Corporation" was discussed. The Board was presented with a resolution which would have authorized its officers to take such action as might be necessary to recover for the BAR such assets as were unlawfully taken from it by Bangor Punta Corporation. Certain members of the Board were not familiar with the ICC report. Accordingly, the Clerk was instructed to send a copy of the ICC report to all Directors, with the understanding that the matter would be acted upon prior to the end of 1971. Also, at the request of certain Directors, this item was not made a part of the Minutes of that meeting. The report was mailed by me to all Directors on August 26, 1971.

7. Present at the second meeting were the following Directors:

Frederic C. Dumaine, Jr.	John R. McPike
D. B. Dumaine	Roger B. Prescott
W. Jerome Strout	Harry C. Wood
Wendell L. Phillips	Thomas S. Pinkham
Joseph R. LaPointe	Richard K. Warren

8. Also present was Mr. Roger A. Putnam, Esq. Mr. Putnam went over, paragraph by paragraph, a proposed form of Complaint against Bangor Punta. I had personally mailed out to all Directors of the BAR six (6) days before the meeting a copy of this draft, notifying all Directors that at the meeting to be held on December 8, 1971 at Bangor, consideration would be given to the authorization of legal action on behalf of BAR vs Bangor Punta Corporation and related companies. This draft is substantially the same as the actual Complaint filed in this case. Mr. Putnam discussed in detail the legal and factual phases of the case.

9. Following Mr. Putnam's presentation, Mr. Frederic C. Dumaine, Jr. introduced a resolution concerning litigation against Bangor Punta Corporation. Following some discussion and some amendments, the resolution was adopted unanimously. An accurate copy of this resolution is attached to my Affidavit marked Exhibit A.

/s/ William M. Houston

Sworn to before me this 17th day
of February, 1972.

/s/ M. Lucille Brimmer
Notary Public

Exhibit A

VOTED, That the Chief Executive Officer of this corporation be and he hereby is authorized for and in its behalf, at such time as he may determine upon advice of legal counsel, to commence and conduct litigation against Bangor Punta Corporation and its subsidiary, Bangor Punta Operations, Inc., which litigation shall be based upon the alleged wrongful acts of said Bangor Punta Corporation and its said subsidiary while they or their predecessor or predecessors owned and controlled this corporation; and that said chief executive officer, any vice president, or the treasurer of this corporation be and each hereby is authorized to execute for and in behalf of this corporation, upon advice of legal counsel, all pleadings, affidavits, motions, notice and other documents requiring execution by an officer of this corporation and relating to the maintenance and prosecution of said litigation.

AFFIDAVIT OF FREDERIC C. DUMAINE, JR.

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE
NORTHERN DIVISION

Frederic C. Dumaine, Jr., being duly sworn, says:

(1) My name is Frederic C. Dumaine, Jr. I am presently president and a director of The Amoskeag Company ("Amoskeag") and also chief executive officer and a director of the Bangor and Aroostook Railroad Company ("BAR"). I have been employed by Amoskeag since 1914 and have held my present positions with Amoskeag since 1951.

(2) I expressly deny that this lawsuit resulted from a personal vendetta of mine. I have no desire to harass or to embarrass the defendants.

(3) On a business level my company, Amoskeag, has been a stockholder in Bangor Punta Corporation ("Punta") from 1964 to 1970. In 1965 Amoskeag made a $5,000,000 loan to Punta in connection with which Amoskeag got some conversion privileges to convert the debt into stock of Punta. Amoskeag later exercised these rights and realized substantial profit.

(4) On a personal level I consider myself an old friend of Curtis Hutchins, who has been a director of Punta since 1964 and also a large shareholder in Punta. We have known each other around twenty years. We frequently lunch or dine together and have exchanged visits to each other's homes. Mr. Hutchins and I represented our respective companies in the negotiations in 1969 that lead to the sale of the BAR by Punta to Amoskeag.

(5) Also I consider myself a friend of Gordon Robertson, who was president of the BAR in 1960-1962 and who

was also president of Punta from 1964-1966 and a director of Punta through 1969. Mr. Robertson has been a director of the BAR from 1960 up until his recent resignation.

(6) Further when Amoskeag acquired the BAR in 1969 from Punta, all the directors who had served under Punta continued to serve as directors including three gentlemen who were also serving as directors of Punta, Harry C. Wood, George H. Seal, and William E. Hill.

(7) While I was a witness called by the S.E.C. in the case *S.E.C.* v. *Bangor Punta Corporation,* 70 Civ. 3940 (S.D.N.Y.), I was not an active participant in that law suit. The S.E.C. sought me out. It sent people to the Amoskeag offices here in Boston to interview me, and I testified in response to a subpoena.

(8) While I had had some prior inklings that all was not right with the BAR, I never seriously considered suing Punta until after my attorneys called my attention to the I.C.C. report on Punta's dealings with the BAR, published last summer.

(9) After that I directed Amoskeag's general counsel, Ely, Bartlett, Brown & Proctor to investigate the matter and, at their suggestion, also retained Mr. Roger A. Putnam of Verrill, Dana, Philbrick, Putnam, & Williamson as Maine counsel.

(10) Later I asked the firm of McGuire, Woods & Battle of Charlottesville, Virginia, to review the work and the conclusions of these other lawyers.

(11) In December, 1971, Curtis Hutchins contacted me and asked if he and some other people from Punta could meet with me to discuss the potential law suit. I agreed

and subsequently met with Mr. Hutchins, Mr. David W. Wallace, the present president of Punta, and two of Punta's attorneys, Mr. Ryan and Mr. Phillips.

(12) The next day Curtis Hutchins called again and asked if Mr. Ryan could meet with my lawyers at McGuire, Woods & Battle. I agreed, and I understand that Mr. Ryan did in fact travel to Charlottesville and meet with my lawyers there.

(13) I did not finally make the decision to institute this suit until after these meetings. I did not make this decision on the basis of personal animosity or ill-will but on the unanimous advice of all my lawyers that the suit had merit and should be brought.

(14) On a personal level I found bringing this suit disturbing, because of my personal relations down through the years with people involved with Punta, as set out in this affidavit above.

/s/ Frederic C. Dumaine

Sworn to before me.
February 18, 1972

/s/ Illegible
Notary Public

My Commission Expires: 8/25/78

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

NORTHERN DIVISION

BANGOR AND AROOSTOOK RAILROAD COMPANY AND BANGOR INVESTMENT COMPANY, *Plaintiffs,* *v.* BANGOR PUNTA OPERATIONS, INC. AND BANGOR PUNTA CORPORATION, *Defendants.*	Civil Action, Docket No. 1933

MOTION RE: RECORD ON APPEAL

Now comes the Plaintiffs by their attorney, Howard H. Dana, Jr., Esquire, and move this Honorable Court as follows:

1. Attached to *Plaintiffs' Pre-Trial Memorandum* was a copy of the Report to the Commission—*Review of Diversified Holding Company Relationships and Transactions of Bangor Punta Corporation,* prepared by the Bureau of Accounts of the Interstate Commerce Commission. This Report was offered to indicate the public interest and concern involved in the treatment of the Plaintiffs by Defendants. This Report included the recommendation that, "(A)ll legal remedies be explored to require the holding company, which sold the carrier, to pay back to the carrier for assets taken with no compensation and charges made where no services were performed." *Report,* p. 2.

It also stated:

"While recognition is given to the adverse effect of such restitution on Punta's stockholders, and the

apparent gift to Amoskeag's stockholders, our primary concern is that carrier assets remain with the carrier for use in maintaining or improving its transportation service to the public."

Report, p. 9. The *Affidavit of Frederic C. Dumaine, Jr.* referred to this Report as having been a factor in this lawsuit being seriously considered. *Affidavit*, paragraph 8.

2. The decision of this Honorable Court which is appealed from states at page 5 in its decision:

"Nor do plaintiffs claim to bring this action . . . in the public interest."

3. Plaintiffs intend to stress in their appeal the public interest in this suit, as indicated by the Report.

4. Plaintiffs have been advised that absent an order by this Honorable Court, the Report will not be included in the "Record on Appeal." Rule 10, F.R.A.P.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court declare that the Report, above referred to, be included in the official "Record on Appeal" to the Court of Appeals.

Dated this 14th day of February 1973.

/s/ HOWARD H. DANA, JR.
Counsel for Plaintiffs

VERRILL DANA PHILBRICK
PUTNAM & WILLIAMSON
57 Exchange Street
Portland, Maine 04111
207-774-4573

No. 73-1059.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BANGOR AND AROOSTOOK RAILROAD COMPANY, ET AL.,
Plaintiffs, Appellants,

v.

BANGOR PUNTA OPERATIONS, INC., ET AL.,
Defendants, Appellees.

MEMORANDUM AND ORDER

Entered March 26, 1973

The appellant's motion pursuant to Fed.R.App.P. 10(c) to supplement the record on appeal by inclusion of a Report by the Interstate Commerce Commission relating to the appellees and the events involved in this suit is denied without prejudice to the appellant's right to argue that the existence of the Report and its indication that there is a public interest in the rectification of the alleged wrongdoing is judicially noticeable.

By the Court:

/s/ DANA H. GALLUP
Clerk.

[Cert. cc: Clerk, U.S.D.C., Maine; cc: Messrs. Robinson, Putnam, Ryan, and Sawyer.]

August 3, 1973, First Circuit Opinion

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 73-1059

BANGOR AND AROOSTOOK RAILROAD COMPANY, ET AL.,

Plaintiffs, Appellants,

v.

BANGOR PUNTA OPERATIONS, INC., ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

Before COFFIN, *Chief Judge,*
McENTEE and CAMPBELL, *Circuit Judges.*

Edward T. Robinson and *Alan L. Lefkowitz,* with whom *Ely, Bartlett, Brown & Proctor, Roger A. Putnam, Howard H. Dana, Jr.,* and *Verrill, Dana, Philbrick, Putnam & Williamson* were on brief, for appellants.

James V. Ryan, with whom *C. Kenneth Shank, Jr., Bruce Topman, Webster, Sheffield, Fleischmann, Hitchcock & Brookfield, Sumner T. Bernstein, Herbert H. Sawyer,* and *Bernstein, Shur, Sawyer & Nelson* were on brief, for appellees.

August 3, 1973

CAMPBELL, *Circuit Judge.* A Maine railroad corporation and its wholly-owned subsidiary bring this action

against their former owners, seeking damages under the federal anti-trust and securities laws, and under state law, for the alleged "looting" of the railroad in 1960-67 when the defendants were in control. Over 99% of its stock was purchased from the old owners after the alleged wrongs. The district court granted defendants' motion for summary judgment, holding that the railroad could not maintain what it termed "typical stockholder claims seeking an accounting for alleged misappropriation and waste of corporate assets by controlling stockholders" since the present owner was not a stockholder at the time of the alleged improper transactions and was not injured thereby. 353 F. Supp. 724, 728 (D. Me. 1972).

Plaintiff, Bangor and Aroostock Railroad Company (BAR),[1] operates a railroad in northern Maine. Plaintiff, Bangor Investment Company (BIC), a Maine corporation, is a wholly-owned subsidiary of BAR. Defendant, Bangor Punta corporation (Bangor Punta), a Delaware corporation the stock of which is listed upon the New York Stock Exchange, is a diversified holding company. Defendant, Bangor Punta Operations, Inc. (BPO), a New York Corporation, is a wholly-owned subsidiary of Bangor Punta.

Bangor Punta, in 1964, through its subsidiary BPO, acquired 98.3% of the stock of BAR, by acquiring all the

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[1] It is alleged in the complaint that BAR "is a Maine Corporation organized in 1891 for the purpose of constructing, maintaining and operating a railroad for public use, and has its principal place of business in Bangor, Maine. It operates a railroad providing essential services for those persons and businesses located in the northern part of the State of Maine. BAR connects within the State of Maine with other railroads which serve the northeastern part of the United States, and which, in turn, connect with other railroads serving the remainder of the United States. Freight shipments of BAR consist of products grown and manufactured in the State of Maine, including potatoes, pulp and paper products, which are sold and used in other parts of the United States."

assets of Bangor and Aroostock Corporation (BAC), a Maine holding company established by BAR in 1960. Bangor Punta, through BPO, continued to own 98.3% of BAR's outstanding stock until October 2, 1969, at which time, for $5,000,000, it sold its stock interest in BAR to Amoskeag Company (Amoskeag), a Delaware investment corporation controlled by Frederick C. Dumaine, Jr. Amoskeag later bought additional BAR shares, and now owns over 99% of all the outstanding stock of BAR.

The complaint contains thirteen counts. Damages totalling $7,000,000, for BAR only, are sought on grounds of mismanagement, misappropriation and waste of corporate assets caused by four intercompany transactions taking place among BAC, Bangor Punta, BAR and BIC during the years 1960-67, while BAC and then Bangor Punta were in control of BAR and BIC. The defendants are said to have violated § 10 of the Clayton Act, 15 U.S.C. § 20, and § 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder. They are also alleged to have violated the Maine common law and Section 104 of the Maine Public Utilities Act, 35 M.R.S.A. § 104.

The wrongful acts allegedly included overcharge by BAC and BPO for services to BAR; causing BAR to excuse BAC and BPO from interest payments due on loans and to pay improper dividends; the improper acquisition of St. Croix Paper Company stock owned by BAR through BIC; and causing BIC to engage in improper borrowings. In essence, defendants are alleged to have "dominated and controlled BAR and exploited it solely for their own purposes, to the injury of BAR and without regard to BAR's future obligations both to its creditors and to the public which it serves. By such domination, control and exploitation, [defendants] calcula-

tedly drained the resources of BAR in violation of law for their own benefit. . . ."

The defendants moved for summary judgment "dismissing the entire complaint, as amended herein, with prejudice, for the reason that the complaint fails to state a cause of action on behalf of the corporate Plaintiffs; or in the alternative . . . dismissing each of Count II and Count V [brought under the Maine Public Utilities Act] of the amended complaint herein, with prejudice, for the reason that each of them fails to state a cause of action."

The district court granted defendants' motion, stating,

> "Defendants seek dismissal of the entire complaint on the ground that Amoskeag, which would be the sole beneficiary of any recovery by the corporate plaintiffs, was not a stockholder of BAR at the time of the alleged improper transactions and itself sustained no injury as a result thereof. The Court agrees. Since the Court therefore concludes that the entire complaint must be dismissed, it does not reach defendants' alternative motion for dismissal of Counts II and V." 353 F. Supp. at 726.

Starting with the proposition that F.R.C.P. 23.1, the so-called contemporaneous ownership rule, would apply to a shareholder's derivative action brought to enforce the claims asserted here, the district court reasoned that Amoskeag, by causing the plaintiff corporations (essentially BAR) to bring this action, was attempting to accomplish indirectly what it could not do directly; namely, to bring "typical stockholder claims" for misappropriation and waste. Since Amoskeag,

> "which did not itself incur any damage as a result of defendants' wrongful acts, and not the corporate plaintiffs, is the real beneficiary of any recovery

which might be had in the name of the corporate plaintiffs, the corporate claims must fail for lack of equity on the part of those who would ultimately benefit from any corporate recovery." 353 F. Supp. at 728.

The district court relied on Commissioner Roscoe Pound's opinion in *Home Fire Ins. Co.* v. *Barber*, 67 Neb. 644, 661-62, 93 N.W. 1024, 1030-31 (1903), and like cases. *See, e.g., Capitol Wine & Spirit Corp.* v. *Pokrass*, 277 App. Div. 184, 98 N.Y.S.2d 291, *aff'd*, 302 N.Y. 734, 98 N.E.2d 704 (1951); *Amen* v. *Black*, 234 F.2d 12, 23 (10th Cir. 1956). *Matthews* v. *Headley Chocolate Co.*, 130 Md. 523, 100 A. 645 (1917). *Home Fire* and its successors hold that a person who was not a stockholder at the time of the alleged mismanagement of a corporation may not later sue derivatively, nor, if he becomes the sole stockholder, may he cause the corporation itself to sue. Central to the conclusion that even the corporation may not sue is the assumption that "the shareholders . . . are the real and substantial beneficiaries of a recovery." *Home Fire Ins. Co.* v. *Barber, supra*, 67 Neb. at 664, 93 N.W. at 1031. Equity, "penetrating all fictions and disguises", treats the corporation as the alter ego of its stockholders: because it would be unjust to enrich them, the corporation may not be enriched. A corollary is that the corporation is barred from suing only if recovery would inure solely to the benefit of the estopped stockholders. If other eligible interests, such as creditors or minority shareholders, would benefit, the corporation may sue; since recovery is for the corporation the estopped stockholders would also benefit, but that is "an injustice which might be necessary to be suffered. . . ." *Capitol Wine & Spirit Corp.* v. *Pokrass, supra*, 98 N.Y.S.2d at 293.

The *Home Fire* rule prevents a purchaser of all or most of the corporate stock, who probably purchased it at a price tied to the value of the assets at the time of sale, from recovering a windfall. Where maintenance of the corporate cause of action serves no other interest, such a result seems reasonable—although we leave open whether the equities reflected in *Home Fire* should be permitted to prevent suits under laws, such as the federal anti-trust and securities acts, that were enacted to protect interests other than, or in addition to, those of the current stockholders. *Cf. Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 139 (1968).

Our difficulty here, however, is more fundamental. Even accepting *Home Fire*, we doubt its applicability. We reject the premise — critical both to the district court's holding and to the *Home Fire* rationale — that BAR's chief stockholder, Amoskeag, would be the "sole beneficiary" of a recovery for BAR. The premise, applied to a rail carrier, seems to us to be an over-simplification, although, without doubt, BAR's recovery would be highly beneficial to Amoskeag. Because of the nature of their services and of regulatory restrictions affecting them, and, more generally, because of their legal status as "quasi-public corporations", railroads cannot realistically be described as mere alter egos of their chief stockholders. If BAR's management complies with the law, recovery of monies by BAR may be expected not only to benefit its stockholders but to improve the economic position of the carrier, enabling it to enhance its services and helping stave off the financial crisis faced today by so many railroads. The net result will be of likely benefit to the public. Such considerations might be irrelevant in cases involving ordinary, closely held businesses; their survival is not usually deemed to be of public concern and they are typically

viewed as mere projections of their stockholders. But courts — even before passage of extensive regulatory laws — have for years held that the public has an identifiable interest in a railroad corporation and in its ability — including its financial ability — to provide services and, indeed, to survive.

The public's interest, unlike the private interest of stockholder or creditor, is not easily defined or quantified, yet it is real and cannot, we think, be overlooked in determining whether the corporation, suing in its own right, should be estopped by equitable defenses pertaining only to its controlling stockholder. Here we think the public's interest in the financial health of BAR provides a separate interest, quite apart from Amoskeag's, which is served by the corporate cause of action.[2] Thus, regardless of

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[2] Under the view we take of the case, we need not consider the district court's conclusion that the present suit is not being maintained in any meaningful way on behalf of the less than 1% of stock not owned by Amoskeag.

Nor do we analyze the extent to which the contemporaneous stock ownership rule is mandated, in a non-derivative action, by F.R.C.P. 23.1. Whether a stockholder is equitably barred from suit because he did not own the stock at the time of the alleged wrong or because he acquired it from wrongdoers is significant here only if we accept the district court's premise—as we do not—that BAR's controlling stockholder is the sole beneficiary of the instant litigation.

It can be argued, of course, that F.R.C.P. 23.1, dealing with derivative suits, does not establish a federal rule of contemporaneous ownership with respect to non-derivative proceedings. The underlying policies for adoption of the Rule—preventing transfer of a few shares to a non-resident to acquire diversity jurisdiction and to discourage strike suits—relate to abuses associated with minority stockholder proceedings. *See Hawes* v. *Oakland*, 104 U.S. 450 (1882); 3B Moore's Federal Practice, ¶ 23.1.15. The Maine Supreme Judicial Court has recently indicated willingness to relax the contemporaneous ownership requirement where fairness and sound policy warrant. *See Forbes* v. *Wells Beach Casin, Inc., et al.*, Docket No. 930, Law Docket No. 1688, June 28, 1973.

the latter's motivations or potential receipt of undeserved benefits, BAR should be permitted, and indeed has a duty, to recover for itself any assets which were divested from it in violation of state or federal law.

A railroad is a "public" or "quasi-public" corporation. *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, 321-22, 332-33 (1897); *Railroad Com'rs* v. *Portland and O.C.R.R.*, 63 Me. 269, 18 Am. Rep. 208 (1872); for a recent state case reafirming the traditional concept, *see Louisville and Nashville Ry.* v. *Sutton*, 436 S.W.2d 487, 490 (Ky. Ct. App. 1969); *see generally* 1 Fletcher Cycl. Corps., § 63 (1963). According to the Maine Supreme Judicial Court,

> "Railroad charters are contracts made by the legislature in behalf of every person interested in anything to be done under them." *Railroad Com'rs* v. *Portland and O.C.R.R., supra*, 63 Me. at 278.

The provision of roads and "other artificial structures" for travel is a duty of government recognized from earliest times. *Id.* at 275. The granting of a franchise to operate a railroad was seen by the Maine court as a farming-out by government of a duty owed to the public.

> "The fare is the consideration for the service performed, whether done by the State directly, or by a corporation under a grant from the State; it is simply a substitute for the tax rendered necessary when the State builds and conducts railroads at the public expense; the corporation, upon the payment of the fare, is under the same obligation to render the required service for the public, that the State would be, if railroads were free, and conducted by State authority. Nor does the ownership of railroads, whether it be

> in the State or a private corporation, affect the nature of their use, since in either case the function to be exercised and the uses to be subserved are public." *Id.* at 275-76.

It can, of course, be argued that all manner of businesses are affected with a public interest. *See Munn* v. *Illinois*, 94 U.S. 113 (1877) (regulation of private grain elevators). However that may be, railroads, involving the use and often the forced taking of interests in land[3] and providing essential transportation, have acquired a unique status in our law; they were said by the Maine court in *Railroad Com'rs* v. *Portland and O.C.R.R., supra,* 275, to be "pre-eminent" among private instrumentalities affected with a public interest. While the development of other modes of transportation has eroded this "preeminence", the Maine courts have not modified their view of the unique legal status of railroad companies, which are also regulated "public utilities" under Maine law, 35 M.R.S.A. § 15.13 *et seq.*

Federal courts, including the Supreme Court, early took the same view of the public or quasi-public character of railroads. In *United States* v. *Trans-Missouri Freight Ass'n, supra,* 166 U.S. at 332-33, the Supreme Court said,

> ". . . railways are public corporations organized for public purposes, granted valuable franchises and privileges, among which the right to take the private property of the citizen *in invitum* is not the least, . . . many of them are donees of large tracts of public

[3] Beginning in 1850, Congress lavishly subsidized railroad construction by land grants: for example, an estimated 40,000,000 acres was granted to the Northern Pacific, *Great Northern Ry.* v. *United States,* 315 U.S. 262, 276 (1942). Under Maine law, land may be taken for railroad purposes by eminent domain. 35 M.R.S.A. § 651 *et seq.*

lands and of gifts of money by municipal corporations, and . . . they all primarily owe duties to the public of a higher nature even than that of earning large dividends for their shareholders. The business which the railroads do is of a public nature, closely affecting almost all classes in the community . . . ."

More recently, the public importance of the rail carriers has been recognized in context of the economic crisis threatening their continued existence. Indeed, since the temporary nationalization of the railroads in World War I, the preservation of the railroads has been a national concern. Interpreting the Transportation Act, 1920, Mr. Justice Brandeis said,

> "By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; . . ." *Texas & Pac. Ry.* v. *Gulf, etc. Ry.*, 270 U.S. 266, 277 (1926).

In 1933, Congress added Section 77 to Chapter VIII of the Bankruptcy Act, providing for the financial reorganization of ailing railroads. A policy of Section 77 is "that the operation of railroads as sound, economic units should be achieved for the benefit of the public, regardless of the interests of creditors and stockholders." 5 Collier on Bankruptcy, 14th ed., ¶ 77.02. p. 469. In *Reconstruction Finance Corp.* v. *Denver & R.G.W.R.R.*, 328 U.S. 495, 536 (1946), the Court said, "[B]y their entry into a railroad enterprise, [security holders] assumed the risk that in any depression or any reorganization the interests of the public would be considered as well as theirs." *See New Haven Inclusion Cases*, 399 U.S. 392, 492 (1970). *Cf.* Note,

Takings and the Public Interest in Railroad Reorganization, 82 Yale L.J. 1004 (1973). Worry over the public effect of the Northeastern railroads' insolvency appears in the Interstate Commerce Commission's *Northeastern Railroad Order of Investigation* (Ex Parte No. 293, Feb. 7, 1973, 38 Fed. Reg. 6253 (1973)), noting the entry into Section 77 reorganization of seven Class I railroads, and the danger that acute cash crises of several might lead to the eventual cessation and liquidation of the transport facilities of the carriers. The I.C.C. found these matters to "create implications of nationwide importance." Similar concern resulting from the Penn Central financial crises was expressed in Senate Joint Resolution 59 approved Feb. 9, 1973 (P.L. 93-5, 87 Stat. 5, 1973 U.S. Code Cong. & Ad. News 379).

In 1960 the Maine Supreme Judicial Court concluded that local freight lines (BAR is one such) were crucially important to the Maine economy. The court said, in *Maine Cent. R.R.* v. *Public Utilities Comm'n*, 156 Me. 284, 163 A.2d 633, 637 (1960):

> "There can be no question as to the very real need which the whole public of Maine has for an efficient freight service by rail. There are many raw materials and products of great weight and bulk which can only be carried efficiently in and out of Maine in freight cars. This state is somewhat remote from the principal markets and thus dependent on fast and economical transportation of goods. We are engaged in spirited competition with our sister states for new industry which will add to payrolls and taxes and assure the economic health of Maine. Moreover, existing established industry must be encouraged and preserved and agriculture must not be deprived of indispensable freight service. Here we are dealing with

the *public interest* in its broad sense for every citizen of Maine has a stake in the industrial and economic vitality of his state."

Given today's circumstances of which we are all generally aware, and the legal history above cited, it would be unrealistic to treat a railroad's attempt to secure the reparation of misappropriated assets as of concern only to its controlling stockholder. To do so grants to the defendants an undeserved immunity from suit, to the disadvantage of the public, solely to avoid a windfall to Amoskeag which, whatever its own lack of equity, is neither a wrongdoer nor a participant in any wrong. We see BAR and its management as seeking a corporate recovery in which the public has a real, if inchoate interest. Amoskeag's windfall is irrelevant to that interest, and should not be the factor which determines whether or not BAR may sue.

Moreover, to prevent BAR from suing to recover assets wrongfully divested is to reject the use of private litigation as a deterrent to patently undesirable conduct. The management of a rail carrier — whoever it may be and whatever its private aims — is best situated to learn of wrongs to the railroad and to take effective action to redress them. The looting of a railroad and its possible decline or even failure are so clearly violative of state and federal policies, as expressed both in legislation and in the decisions of courts, as to invite the encouragement of private lawsuits as a supplement to public enforcement. *See J. I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964); *Perma Life Mufflers, Inc.* v. *International Parts Corp., supra*, 392 U.S. at 139. The private financial incentive for those bringing the action helps assure that it will be brought; federal and state agencies, sometimes hampered by inadequate funding or diverted by other concerns, may not be able to take the necessary action.

Thus we hold that neither the federal nor the state counts are foreclosed by the failure of BAR's principal stockholder to own its stock during the period of the wrongful conduct nor by Amoskeag's purchase of the stock from the alleged wrongdoers.

We are left with a final major question which we do not now attempt to resolve; namely, the extent, if any, to which the district court should try to insure that recovery, if any, does not benefit Amoskeag at the expense of the railroad and the public which it serves. If BAR should recover, Amoskeag's BAR stock will increase in value. An increase in stock value is a windfall which can hardly be avoided; it would not be inconsistent with the public's interest in a healthier railroad. On the other hand, a syphoning off of BAR's recovery into the pockets of present stockholders or others would be different. Hopefully, the very logic by which appellants are allowed to sue here may help to deter at least illegal distributions. In any event, we have no doubt of the power of the district court, in conjunction with any recovery, to enter orders, if appropriate, prohibiting distributions by BAR that would conflict with state or federal law. A more difficult question arises with respect to its ability to enter more sweeping prohibitions to ensure that BAR's recovery is not unreasonably diverted for the private enrichment of its stockholders.

If plaintiffs prevail, the latter is a matter which the parties and the district court may consider further, possibly with the invited assistance of state and federal agencies. Our ruling that the plaintiffs may sue is not conditioned on the devising of court-imposed limitations on the uses of any corporate recovery. Even without limitations, the public interest is better served than were civil immunity to be assured to those who may have

syphoned funds from a rail carrier in violation of State and federal law. Whether a court could properly or practicably regulate (beyond existing state and federal law) the use which a carrier might make of any recovered funds, we are not prepared to decide at this time.

We understand the district court's order for summary judgment to be based solely on its determination that plaintiffs were barred from suing because of Amoskeag's failure to own stock at the time of the alleged wrongs and its purchasing of stock from alleged wrongdoers. Our decision reverses that determination; it leaves all other issues open, including the merits of plaintiffs' claims, which have yet to be tried. The district court not having ruled thereon, we express no opinion on defendants' motion, on different grounds, to dismiss Counts II and V.

Reversed and remanded for proceedings consistent herewith.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 73-1059.

BANGOR AND AROOSTOOK RAILROAD COMPANY, ET AL.,
Plaintiffs, Appellants,

v.

BANGOR PUNTA OPERATIONS, INC., ET AL.,
Defendants, Appellees.

JUDGMENT

Entered: August 3, 1973

This cause came on to be heard on appeal from the United States District Court for the District of Maine, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the district court is vacated, and the cause is remanded to that court for further proceedings consistent with the opinion filed today. No costs at this time.

By the Court:
/s/ DANA H. GALLUP
Clerk.

[cc: Messrs. Robinson and Ryan.]

Supreme Court of the United States

No. 73-718

Bangor Punta Operations, Inc., et al.,

Petitioners,

v.

Bangor & Aroostook Railroad Company, et al.

ORDER ALLOWING CERTIORARI. Filed January 7 ----------, 1974.

The petition herein for a writ of certiorari to the United States Court of Appeals for the First ----------Circuit is granted.